UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRI-COUNTY PAVING, INC.

and Case 30–CA–15275

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION 139, AFL-CIO

C. Samuel Facey and Paul Bosanac, Esqs.,
of Milwaukee, Wisconsin, for the General Counsel.
William Burg, of Pewaukee, Wisconsin,
for the Charging Party.
James K. Pease, Esq., of Madison, Wisconsin,
for the Respondent.

DECISION

Statement of the Case

Richard H. Beddow, Jr., Administrative Law Judge: This matter was heard in Madison Wisconsin on August 22 and 23, 2001. Briefs were filed on September 28, 2001, by the General Counsel and the Respondent. The proceeding is based upon a charge filed September 5, 2000[1], by International Union of Operating Engineers, Local Union 139. The Regional Director's complaint dated November 29, as amended, alleges that Respondent, Tri-County Paving Inc., of De Forest, Wisconsin, violated Section 8(a)(1) of the National Labor Relations Act by failing and refusing to consider for employment and/or to hire named applicants because of their union membership and union activities and in order to discourage employees from engaging in these activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in business as a paving and excavating contractor in Wisconsin. It annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Wisconsin and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Sections 2(2) (6) and (7) of the

[1] All following dates will be in 2000 unless otherwise indicated.

Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Company generally has between 35 and 38 employees. The Respondent's owner and President, Terry Wenger, is responsible for all hiring decisions, including reviewing applications, interviewing applicants, and placing ads for new employees, including equipment operators, laborers, dump truck drivers, and lowboy drivers (who hauls equipment with a semi trailer). The company primarily performs small-scale grading and paving projects such as driveways, parking lots and high school running tracks as well as occasional utility excavating.

On March 5, 12 and 19, Respondent ran ads in the Wisconsin State Journal for an experienced grader operator (one position) for finish grading. On March 6, Rick Bolton, Willie Ellis, Gerald Mittelstaedt and Dave Zulegar completed and submitted applications to the Respondent for the operator position and they identified themselves as union organizers.

Meanwhile, on March 13, union organizer Mark McNamer applied covertly for the same position (keeping his union affiliation secret). He was interviewed by Wenger on March 14 and hired for the operator position. None of the overt union applicants were contacted or hired at that time.

On April 14, 15, and 19, the Respondent ran additional ads in the *Wisconsin State Journal* seeking experienced backhoe operator, lowboy driver and dump truck driver (to fill three positions), and on April 22 and 23, it ran ads for a dump truck driver in the same paper.

On April 20, organizer Bolton also responded to the early April ads as did Ellis who applied for an equipment operator position. Ken Miller applied for excavator and grader positions, James Patterson applied for excavator operator, dump truck and lowboy driver positions and Wayne Mau applied for operator and lowboy driver positions. As each the five operators came in, they identified themselves as union organizers to Wenger and filled out applications.

After hiring McNamer on March 14 (he actually started at a latter date), Wenger ran ads for a backhoe operator because his current one had quit. Wenger's half-brother, Dan Wenger, who ran the Company's paver, then asked if he could have the backhoe (sometimes referred to as an excavator) job. Owner Wenger said he decided that he would transfer his brother only if Jeff Birkett, the Company's lowboy driver (an experienced paver operator), agreed to return to the paver. Wenger asserted that he thought that it was just too difficult to find a new employee experienced on the paver. A week later Birkett agreed to the change (he still holds the paver position). This left the lowboy and dump truck driver jobs still open.

Wenger said he became a "little bit suspicious" that Union organizers had applied in response to his ads. He recalled that at some unspecified earlier time he had been solicited by the Union about "joining" and, when he had declined he had been told he would be "targeted" by the Union. He said he then became very nervous. He also asserts that on April 9 there was a mysterious knocking on his home window at 11:00 p.m. and that on April 11 a dozer was stolen from a job site. He said he started to "panic". About 9 days later he spoke to another contractor who made him aware of union "salting". On April 20, he had an internet search made of the term and asserts that "most everything I was reading was horrible" and he concluded that he would lose his business.

Without getting further advice, he devised a plan to have new hire McNamer (who he thought was non-union), change the date of his March 13 application to February so that if the Union claimed discrimination for not considering or hiring the organizers who applied, it would appear that he had decided not to fill the finish grader operator position advertised in March.

On April 20, Wenger called McNamer and making an appointment to meet the next day. He met with McNamer and asked him to, among other things, change the date and work experience listed on his original application. He destroyed McNamer's original application and instructed McNamer to lie if questioned about when he was hired. This entire conversation was covertly tape recorded by McNamer. Around the same date Wenger's brother, Danny, moved from the paving crew to fill the backhoe position. On April 24, Ray Wadinski applied for the newly advertised backhoe operator, lowboy and dump truck driver positions. He identified himself as a union organizer on his application. On April 27, Respondent hired Wayne Mau to work as a dozer operator. Mau, who had applied as an overt union organizer on April 20, was not hired in response to any of the ads placed by Respondent in the *Wisconsin State Journal* but was hired for a newly opened vacancy. Respondent also hired Duane Kidd on May 2 as a lowboy driver, however, Kidd quit after working only one week. Respondent hired Randy Kroon prior to May 15 as a driver and laborer. On May 18 or 20, Respondent hired Richard Loomis as a truckdriver. On July 11, Sean Calnin began working for Respondent as an operator and laborer and during this period Richard Williamson, a former employee, worked part-time as an equipment operator.

Pertinent sections of Wenger's conversation with McNamer and the Respondent's testimony will be set forth in more detail in the following discussion.

Discussion

Here, the General Counsel contends that the Respondent discriminatorily refused to consider and to hire Union organizers and request an instatement and make whole remedy. The Respondent admits that owner Wenger made a panic-induced "mistake" in his dealings with covert applicant McNamer but argues that thereafter it did not discriminate in its hiring but merely followed its past hiring criteria. It also requests reconsideration of the Court's pre-hearing order, which struck several of the Respondent's affirmative defenses.

A, Criteria

In its decision in FES (A division of Thermo Power) 331 NLRB No. 20(2000), the Board held that in order to establish a discriminatory refusal to hire, the General Counsel first must show:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time or the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire applicants.

In order to establish a discriminatory refusal to consider for hire, the General Counsel must show:

> (1) that the respondent excluded applicants from a hiring process; and (2) that

> antiunion animus contributed to the decision not to consider the applicants for employment.

If this is established, the burden shifts to the Respondent to show that it would not have hired or considered the applicants even in the absence of their union activity or affiliation.

B. Ruling On Affirmative Defenses

Prior to the start of the hearing, by Order dated August 17, 2001, I substantially granted the General Counsel's request to strike several of the Respondent's affirmative defenses (relating generally to the applicants' status as bona fide applicants) and I also granted the Charging Party's petition to revoke a subpoena served on it by the Respondent finding, specifically, that:

> I find that good cause is shown to grant the General Counsel's request as to items 20, 21, 22, 23, 30, 31 and 32. In this connection it is noted that it is well established that motivation and misconduct of a charging party is not a defense to an unfair labor practice charge. Otherwise, it is inappropriate to concurrently litigate collateral or compliance issues and, accordingly, the trial will proceed as scheduled on August 22, 2001 at the time and place designated to develop a record and address the allegations of the complaint under the Board's criteria set forth in FES (A Division of Thermo Power), 331 NLRB No. 20 (2000).
>
> It also appears that good cause is also shown to Revoke (the) noted subpoena to the specific extent contested by the Charging Party, see the adoption by the Board of my rulings in *Interstate Builders, Inc.,* 334 NLRB No. 104 (2001), also cited by the Respondent in its pleading.

The Respondent moved for Special Permission to Appeal my Order and on August 22, 2001, during the course of the trial, the Board considered the special appeal and then affirmed my Order. It noted that:

> In affirming the Judge's ruling striking the Respondent's affirmative defense 23, we note that in *Sunland Construction Co*. 309 NLRB 1224 (1992), the Board did not hold that paid union organizers lose their "employee" status where it is shown, based on objective evidence, that the union organizers engaged in conduct which would create a disabling conflict of interest. Rather, the Board simply held that, where a disabling conflict of interest exists, an employer may establish a "substantial and legitimate" business justification for declining to hire a paid union organizer. Id. At 1231.

Shortly thereafter, on August 27, 2001 the Board issued its decision in *Aztech Electric Co.,* 335 NLRB No. 25. In particular, the Board's decision disagreed with the Administrative Law Judge's rulings regarding asserted disabling conflicts of paid union organizers during a "salting" campaign and their status as bona fide employees. These same rulings had been substantially relied upon by the Respondent here as the basis for its own affirmative defenses. In *Aztech* supra, the Board quotes extensively from the Supreme Court's decision in *NLRB v Town & Country Electric* 516 US 85 (1990), regarding the status of paid union organizers as valid employees. The Board went on to state that a disabling conflict defense is effectively a *Wright*

Line defense[2] and that even assuming that a disabling conflict existed, a Respondent must prove it existed and that it actually relied upon such a conflict with respect to the alleged discriminatory actions in the case.

In the instant case owner Wenger testified extensively about the circumstances of his "panic" attack after he had reviewing entries under the term "salting" on the internet and he also noted his belated remembrances that after rejected Union attempt to enlist the Respondent as a Union contractor, the Union indicated that it would "target" the Respondent. This limited awareness of "conflict", however, is not shown to have any timely relationship to his dealings with the union organizers who applied for employment in the Spring of 2000.

On brief, the Respondent's Counsel refuses to accept the Board's rulings on these issues and argues that a disabling conflict can exist whether or not the employer is aware of them. It appears that Counsel for Respondent here was also the same Counsel who unsuccessfully argued these similar issues before the Supreme Court in the *Town & Country* case, supra.

Here, the Respondent's disabling conflict argument also is based upon alleged statements attributed to Union agent Mike Lucas in Union strategy manuals entitled "Union Organization In the Construction Industry" and "Strategic Planning-1997" in which the term "Terrorize the utilizers" is used in reference to salting.

Unfortunately, verbal excesses by both management and unions are a reoccurring part of labor conflicts. Also, tactics used by a union may be wise or unwise, successful or unsuccessful but unless they are extreme, they do not act to make a Respondent's proven conduct any less discriminatory and it is well established that the alleged misconduct of a charging party is ordinarily not a defense to an unfair labor practice. See *Carpenters Local 621 (Consolidated Constructors),* 169 NLRB 1002, 1003 (1968), enfd. 406 F.2d 1081 (1st Cir. 1969) and *Plumbers Local 457 (Bomat Plumbing),* 131 NLRB 1243, 1245-1247 (1961), enfd. 299 F.2d 497 (2nd Cir. 1962). Otherwise, the propriety of an employer's conduct in a failure to consider/hire proceeding turns on the nature of the act, not on the motive or intent of the job applicant, unless special, extreme circumstances,[3] not shown here, exist.

At the hearing the Respondent's owner testified fully about the background of his alleged fears about the "salting." These include (1) the comment by an unidentified Union agent at some unspecified time that he would that the company would be "targeted" (for organization), (2) that he become little "suspicious" when union organizer answered his employment ads, (3) that in early, April someone knocked on his window and a dozer was stolen and (4) that he read mostly "horrible" statements about salting after an internet search. Otherwise, there is no indication that that he was aware of the Union's strategy documents or the comments some Union publications or Union agents made regarding salting. Under these circumstances, there is no credible evidence that any relevant extreme or special circumstances exist (or probability that it would likely be shown to exist), that would somehow establish a disabling conflict of

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[2] 251 NLRB1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. Denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (19830. See also Manno Electric, Inc., 321 NLRB 278, 280 fn. 12 (1996).

[3] In fact, I have found that a Respondent has successfully met its *Wright Line* burden by persuasively showing that an applicant was not hired because of his personal, outrageous conduct, not because of his union conduct or the employer's union animus, see *American Steel Erectors, Inc.,* JD–29–00, dated March 2, 2000, currently pending before the Board.

interest that would take away the alleged discriminatee union organizers' status as bona fide employees.

In the instant case, it appears that the Respondent's Counsel has seized upon the opportunistic use of the Respondent's perceived plights as a vehicle for use as a collateral attack on the Supreme Court's *Town and Country* ruling, supra. No argument or alleged facts are advanced on brief that would justify any change in my order of August 17, 2001, or the Board's August 22, 2001, affirmation of that order and I reaffirm the rulings therein. That order also properly put the Respondent on notice of what appropriate criteria applies to a case of this nature and, as set forth above, that criteria will be followed.

Animus

Animus is an element of the criteria for both refused to consider and refusal to hire cases. Here, the Respondent owner's own words and his actions on April 21 in arranging for covert applicant McNamer to change and falsify his application for employment act as an admission of the Respondent's discriminatory intent regarding the employment applications filed by the several union organizers in March and April in response to its advertisements during those same months seeking equipment operators and drivers.

First, McNamer credibly testified that during his initial interview on March 13, owner Wenger asked him whether he had ever worked Union in the past. Then, on April 21, Wenger made a series of statements to McNamer, statements that were recorded on an audiotape as reflected in a transcript of that conversation (admitted into evidence as General Counsel's exhibit 51). Relevant portions of that transcript reflect the following:

> Wenger: But…ahum so that, that's no problem, the other thing I mentioned to you and you said you, you had nothing to do with the unions or nothing ever…
>
> McNamer: Okay right.
>
> Wenger: And ahm, I was going through this and I got a little, I got a little maybe a little problem ahm…I'm not so sure…but remember I said that they came in and applied…
>
> McNamer: Yeah.
>
> Wenger: The union…bosses did or…
>
> McNamer: Right.
>
> Wenger: Organizers…and I think is what their trying to do is catch me up in like discrimination…like I discriminated against them and you know…when they fill out these things they got a lot of years of experience and stuff like that…
>
> McNamer: Okay.
>
> Wenger: I think you even have more…but I though do we even have to hassle with it cause all I'd have to have you do is make out a new application here with a date a little earlier than that and like I hired you before I even put that ad in the paper…

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Wenger: They came in…like three six; a bunch of em did…a bunch of union organizers…

McNamer: Okay.

Wenger: Filled out applications.

McNamer: All right.

Wenger: Wanting me to hire them…if I hired one of them…they'd get in the foot in the door and then they start preaching everybody in here, how it should be union.

McNamer: Right, okay I see.

Wenger: Okay well…I, you came along, filled this application out I hired you…

McNamer: Hmm, hmm.

Wenger: They…could say I discriminated against them because their union…and I hired you instead of them…

McNamer: Why, why are you authorize, why are you…

Wenger: Obligated?

McNamer: Yeah obligated.

Wenger: No different than this…it's just to throw a wrench in things it doesn't mean that I would win or lose in a court of law…I might win…

McNamer: Hmm, hmm.

Wenger: I mean I might win say geeze you have more experience than they did whatever and I hired you.

McNamer: Right.

Wenger: But do I even want to go through that law…

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McNamer: So you wanna…

Wenger: I was just wondering…

McNamer: Change the date.

Wenger: I just want to change the date, but is why I would have probably have to have you do is like make a new one out…

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Wenger: And, and officially if anybody ever asked you I hired you before…

McNamer: Before the ad even come out….

Wenger: Yeah…

McNamer: Okay.

Wenger: And that ad in the paper, if it ever came up and I don't think it's gonna…that one isn't…see I put another ad in now…and they flocked in here…

McNamer: Another ad for blade operator?

Wenger: No for ah, for like a escavator…

McNamer: Oh…

Wenger: Lowboy driver…

McNamer: Other position.

Wenger: Other positions…

McNamer: Oh I see…

Wenger: I had about six or eight of them in here yesterday and…

McNamer: Really?

Wenger: Union guys!

McNamer: Wow.

Wenger: And this other, their trying ah…flub me up…get me in a lawsuit where I owe ten thousand dollars or a hundred thousand…but, and they'd let me make that go away if I sign in the union…

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Wenger: And before I hire anybody else…I'm going by the advise of my attorney…he doesn't know…my attorney even…I said, he said did you, have you hired anybody? And I said I hired one guy this winter and I hired him before that ad went out.

McNamer: Oh, Okay

- - - - - - -

Wenger: You guys aren't union…your…they even put right on there union organizers…and then they put all their background experience grader operator…

McNamer: Hmm, hmm.

Wenger: Experience this experience that…

McNamer: Hmm, hmm.

Wenger: And…

McNamer: Qualified people…

Wenger: There qualified people…they really are…

McNamer: Yeah.

Wenger: And…and by law…I have to look at them no matter what color, what…

McNamer: Right.

Wenger: You know whatever…

McNamer: Okay.

Wenger: And their experienced…and if I hired you…and you had less experience than them…they can throw a wrench in that and say why…they discriminated against me cause I'm union I know that's the reason…

- - - - - - -

Wenger: I hope you understand what I'm trying to do…I'm not trying to, you know…this is terrible bring a new guy in and start telling him we should redo his paperwork and stuff but ah…I'm just trying to save us a big hassle for you and me…I think…

- - - - - - -

Wenger: Shouldn't you be able to hire whoever the hell you want regardless of their experience? Regardless of there color? I'm not saying that I shouldn't…I should be antiblack or something that I can't hire black…if I had a guy that I thought could do it and a white guy here…I'd hire a guy that…I don't have a problem with that.

McNamer: Right.

Wenger: Ain't that something? Okay let's see…let's put this together and destroy the rest…okay this one…this one…this one…and…

McNamer: These are the old ones…

Wenger: Right…we didn't have to do this one…so…

Here, I find that this transcript clearly shows that Wenger's hiring actions and decisions in the spring of 2000 were motivated by a willful desire to avoid the consideration of or the actual hiring of union applicants and that Wenger willfully induced the falsification of evidence on matters that he thought could be the subject of a legal discrimination complaint. Not only was the date changed but the contents of the application were altered so that McNamer appeared to have applied before the Union applicants. Also, his qualifications were changed to more closely matched Respondent's job needs than did the qualifications of the Union applicants and Wenger also attempted to create the appearance that he had decided not to fill the advertised positions. He also made statements to McNamer during a job interview regarding his union preferences and union affiliations.[4]

In addition, Brian Cole, a former employee and operator for Respondent, testified that one day by the shop after work Wenger threatened employees that if he was forced to go union he would cut back the paving crew and some of the other crews and also would cut their work time back to 40 hours a week and they would no longer be paid for time spent travelling to and from job sites. Jeff Albrecht, also a former employee testified that Wenger told him that if he were to go union he would get rid of the paver and the guys' hours would be reduced to 40 hours a week. Both of these witnesses gave credible testimony and, on the overall record I find that the General Counsel clearly has established that the owner Wenger's hiring decisions in the spring of 2000 were tainted and motivated by his animosity against the Union's organizational attempts.

D. Hiring Plans and Applicant Qualification

There is little dispute over the fact that in the spring of 2000, the Respondent place several ads for employees in the local paper, that it had job openings that were filled by new hires or the transfer of other employees. The job openings were for positions as experienced grading operators, backhoe operator and lowboy and dump truck driver. New hires during this period included covert union organizer McNamer and Duane Kidd, Richard Loomis, Randy Kroon, Wayne Mau, Ryan Hortsmeyer and Sean Calnin.

The applications of the overt union organizers show their union affiliation and their experience and, otherwise, it is apparent from some of Wenger's tape recorded admissions (noted above), that he believed the Union applicants had experience and training relevant to the announced requirements of the advertising positions. Moreover, Wenger also specifically testified that all of the union applicants had lots of experience in grading and highway work.

Under these circumstances, I find that the General Counsel successfully has met the three point *Thermo Power* refusal to hire criteria.

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[4] There was no specific allegation of a Section 8(a)(1) violation in regard to Wenger's statements to McNamer, which questioned his union preferences, and past union involvement. Although it can be appropriate to find and remedy a violation when the issues is closely connected to the matter of a valid complaint and is fully litigated I find that it is unnecessary to do so in this instance. The Respondent's actions, however, are inherently coercive and unlawful see *M.J. Mechanical Services,* 324 NLRB 812, 813 (1997), and they constitute another basis for finding antiunion animus.

E. Refusal to Consider

The record also shows that after the Respondent placed ads and received job applications from the alleged discriminatees in March and April, 2000, it made no timely attempt to consider such applications with the belated exception of a interview and offer to union organizer Wayne Mau. Clearly, Wenger's own recorded statements show that he excluded union applicants from the hiring process and that his animus against the union motivated his actions. The General Counsel has met the refusal to consider criteria and, accordingly, the record will next be evaluated to consider whether the Respondent has met its burden to show that it would not have considered or hired the alleged discriminatees even in the absence of their affiliation with the union.

F. Hiring and Considerations Absent Antiunion Motivation

On brief the Respondent contends that it based its hiring decisions on legitimate, non-discriminatory criteria, and that the applicants it did hire better met its non-discriminatory preferences. It appears that the Respondent's work force is generally stable, with not a great amount of turnover and it fairly appears that it often hires applicants with farming backgrounds or backgrounds as laborers and those who were referred by other employees. The position it described in its ads, however, were not for laborers but for equipment operators and drivers and the Respondent's contentions do not squarely address its burden. As pointed out by the Court in *Transportation Management Corp.,* supra:

> an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the General Counsel's strong showing is not overcome by the Respondent's reliance on its asserted justification. Specifically, I do not find Wenger's described reasons to be persuasive or fully credible inasmuch as they tend to be directly at odds with his earlier freely offered discourse to McNamer where he brazenly solicited McNamer's contrivance in Wenger's own scheme to misrepresent the nature of his hiring practices. The text of Wenger's conversation shows that this misrepresentation was precipitated by the fact that union organizers responded to his ads for employees and that he intended to discriminatorily favor apparent non union applicant McNamer over union applicants, regardless of their respective qualifications, when they applied for work because he took the position that:

> Organizers…and I think is what their trying to do is catch me up in like discrimination…like I discriminated against them and you know…when they fill out these things they got a lot of years of experience and stuff like that…
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> - - - - -
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> Wanting me to hire them…if I hired one of them…they'd get in the foot in the door and then they start preaching everybody in here, how it should be union.
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> and if I hired you…and you had less experience than them…they can throw a wrench in that and say why…they discriminated against me cause I'm union I know that's the reason…
>
> - - - - -

> I hope you understand what I'm trying to do…I'm not trying to, you know…this is terrible bring a new guy in and start telling him we should redo his paperwork and stuff but ah…I'm just trying to save us a big hassle for you and me…I think…
>
> - - - - -
>
> Shouldn't you be able to hire whoever the hell you want regardless of their experience? Regardless of there color? I'm not saying that I shouldn't…

Based on the tenor of Wenger's comments and my observation of his demeanor while testifying, I conclude that he intentionally planned to discriminate against union applicants and to favor supposedly non union applicant McNamer and I further conclude that he intended to and did continue to discriminatorily avoid hiring any union applicants for the driver positions that subsequently were filled in May of 2000.

I find that in mid March, four qualified union organizers; Bolton, Ellis, Mittelsteadt and Zulegar, applied for the advertised equipment operators position and were discriminatorily not considered or hired because the Respondent proactively hired non union applicant McNamer. Although the fact that the Respondent subsequently (in April through June) hired Bolton and Zulegar (and Wadinski) for an operators position, can affect the Remedy portion of this decision, it does not preclude the necessary finding that the Respondent's earlier actions were discriminatory at the time it occurred and I find that it acted in violation of the Act, as alleged.

I further find that in late April qualified union organizers Bolton, Ellis, Miller, Patterson and Wadinski applied for the operator positions that were advertised in April. Union applicant Mau also applied and was hired for a separate, unadvertised position as a dozer operator. Wenger's brother then took the vacant operators position and their appear to be no contention that these last described union applicants' were discriminatorily denied consideration or hire for any vacant operators position. Bolton, Patterson and Wadinski also applied for the advertised lowboy and dump truck driver positions. As noted, Bolton and Wadinski, however, subsequent each were hired in May for an operators position, however, they were not given timely consideration and were not timely hired for any of the open driver positions. Patterson also was not hired or considered for the two driver positions. Bolton and Wadinski subsequently (on May 9 and May 29, respectively), were offered operator positions and therefore I consider them to be no longer available for any driver position.

It would make no sense for the Respondent to falsify of McNamer's hiring process in order to avoid detection and accountability for legitimate and non-discriminatory hiring practices. Accordingly, it may be inferred that the Respondent's purpose was in furtherance an intent to avoid hiring any union affiliated applicants and a plan to only hire who it wanted, namely non union employees. Under these circumstances, I conclude that in March and April of 2000, the Respondent knowingly rejected union applicants in favor of a supposedly non union applied who was induced to falsify his applicant in order to facilitate the Respondent's willful attempt to avoid consideration of or the actual hiring of Union applicants who the Respondent expected would pursue their lawful rights to engage in union organizational activities.

Here, McNamer discriminatorily was given an operators position so that the job would not be given to a union affiliated applicant, a person who Wenger feared would "start preaching everybody in here, how it should be union." Accordingly, Wenger did not consider any of the March union applicants and one of them was not hired because of Wenger's discriminatory

preference for McNamer. Under these circumstances, one of them is entitled to an instatement and make whole remedy.

With respect to the two separate lowboy and dump truck driver positions available, Wenger gave no explanation as to who drove the lowboy after Duane Kidd his non union choice, quit after one week or why he then did not offer it to Patterson who appeared to be equally as or at least the next most qualified. Respondent's Exhibit No. 8 however, is a chart which indicate that dump truck driver Al Watters moved to the lowboy and was replaced on May 30 by a newly hired driver, Horstmeyer.

On examination by the General Counsel Wenger specifically agreed that he was looking for someone with a good driver record a CDL and with experience moving equipment. He also agreed that prior experience driving a lowboy and different type of dump trucks would have been sufficient experience. Neither Kidd (property damage) or Patterson (speeding) had a clean drivers record. Otherwise, Patterson had seemingly greater experience in operating equipment (a skill necessary to move loader, dozers, etc., on and off the lowboy) and I am not persuaded that Wenger had truthfully, objective reason for preferring Kidd over Patterson, especially in view of the fact that Patterson again was not considered (or hired) when Kidd abruptly left after 1 week. Accordingly, I conclude that the Respondent also discriminatorily failed to fill the lowboy driver position with a qualified union applicant (or, secondarily, to latter fill the resulting vacant, dump truck driver position) and I find that one lowboy driver position would have been filled by a union applicant (Patterson), were it not for the Respondent's anti union motivation and intent.

In conclusion I find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation. Accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's unlawfully refused to consider for employment or to hire the discriminatees named below for openings filed by other applicants and thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

Conclusions of Law

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to consider applicants for employment and failing and refusing to hire applicants for employment based on their suspected union sympathies, Respondent discriminated in regard to hired in order to discourage union membership in violation of Section 8(a)(1) of the Act.

V. Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

In accordance with *Thermo Power* supra, and *Dean General Corporation*, 285 NLRB 573 (1987), refusal to hire discriminatees are entitled to a make whole remedy. It is noted that it is well established that when ambiguities or uncertainties exist in compliance proceedings, doubts should be resolved in favor of the wronged party rather than the wrong doer, see *Paper*

Moon Milano, 318 NLRB 962, 963 (1995) and *United Aircraft Corp.,* 204 NLRB 1068 (1973). Under these circumstances, it having been found that the Respondent discriminatorily filled the March 5, 2000, advertised opening for an experienced grader operator by hiring Mark McNamer on March 14, 2000, and failed and refused to consider or hire qualified union affiliated applicants Rick Bolton, Willie Ellis, Gerald Mittelstaedt and Dave Zulegar who each responded to the ad on March 6, 2000, one of these discriminatees would have been hired under non discriminatory circumstances and is entitled to instatement and a make whole remedy, leaving to compliance the determination of any limits on the instatement remedy and the extent of tolling of the Respondent's liability where the Respondent will have the opportunity to show limiting factors, see *Ferguson Electric Co.,* 330 NLRB No. 75 (2000), and *Serrano Painting,* 331 NLRB No. 120 (2000).

It also having been found that the Respondent discriminatorily filled the April 14, 2000, advertised opening for a lowboy driver (or, alternatively, for a dump truck driver), and failed and refused to consider or hire qualified union affiliated applicant James Patterson for one position as a driver. Patterson also is entitled to instatement and a make whole remedy and it will be recommended that Respondent offer immediate and full instatement to Patterson in the position of lowboy driver and to one of the other discriminatees named above in the position of grader operator, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the failure to hire them, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[5] Otherwise, it is not considered necessary that a broad Order be issued.

On the foregoing findings of fact and conclusions of laws, on the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[6]

ORDER

Respondent, Tri-County Paving, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to consider for employment and failing and refusing hire job applicants for the positions of grader operator and driver because they are members or sympathizers of the Operating Engineers Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

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[5] Under *New Horizons*, interest is computed at the 'short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer one of the following named discriminatees immediate and full instatement to the position or grader operator for which the Respondent was hiring: Rick Bolton, Willie Ellis, Gerald Mittelshedt or Dave Zulegar and offer James Patterson immediate and full instatement as lowboy driver and if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the Remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to hire and within 3 days thereafter notify the named discriminatees in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Madison, Wisconsin, facilities and all current job sites, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceeding, the Respondent has gone out of business or closed the facility involved in the proceeding, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 14, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

(f) In all other respects the Complaint is dismissed.

Dated, Washington, D.C. October 26, 2001.

Richard H. Beddow, Jr.
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to consider for employment and fail and refuse to hire job applicants for the position of equipment operators and drivers because they are members or sympathizers of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order offer one of the following named discriminatees immediate and full instatement to the position or grader operator for which the Respondent was hiring: Rick Bolton, Willie Ellis, Gerald Mittleshedt or Dave Zulegar and offer James Patterson immediate and full instatement as lowboy driver and if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner specified in the section of the Administrative Law Judge's Decision entitled "The Remedy."

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful failure and refusal to hire and within 3 days thereafter notify each of them in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.

TRI-COUNTY PAVING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 West Wisconsin Ave., Suite 700, Milwaukee, Wisconsin 53203–2211, Telephone 414–297–1819.